No. 14,460

IN THE

United States Court of Appeals

For the Ninth Circuit

JUNSO FUJII,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.

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Subject Index

Table of Authorities Cited

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BRIEF FOR APPELLEE.

STATEMENT OF PLEADING AND FACTS DISCLOSING JURISDICTION.

Appellee agrees with Appellant's statement of jurisdiction except that the District Court did not have jurisdiction over subject matter under 8 USC Section 903, but had jurisdiction to decide jurisdiction under 8 USC Section 903.

STATEMENT OF THE CASE.

Appellee disagrees with Appellant in the following respects:

(a) There is no evidence in the record that the supplemental portions of the Amended Complaint were allowed to be filed (R. 16, 17, 29) but reference to the Court's written opinion (R. 22) indicates that the Court retroactively contemplated their being allowed.

STATUTES INVOLVED.

In addition to the statutes cited by Appellant (Opening Brief, pages 2, 3) there is involved: 8 USC Section 901:

> *Procedure when diplomatic official believes that person in foreign state has lost American nationality.*
>
> "Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his American nationality under any provision of subchapter IV of this chapter, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates. Oct. 14, 1940, c. 876, Title I, Sub-chap. V, §501, 54 Stat. 1171."
>
> *Section 403(a)(42) of the Immigration and Nationality Act, 1952, (66 Stat. 166 et seq.).*

"Sec. 403(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
(42) Act of October 14, 1940 (54 Stat. 1137)."

FACTS.

Appellee disagrees with Appellant in the following respects:

(a) Application for registration as an American citizen was denied by the Vice Consul on March 20, 1953 (R. 13);

(b) That on December 18, 1952, the Washington office of the Department of State approved the Certificate of Loss of Nationality of the Plaintiff;

(c) That on November 20, 1952, the Vice Consul at Kobe, Japan, may have been acting as an agent for and on behalf of the Defendant Secretary of State (R. 7) but not in the matter of making a decision as to (1) denial of a *right or privilege* of a national or (2) issuance of a Certificate of Loss of Nationality. 8 USC Sections 901 and 903;

(d) That on December 18, 1952, the Washington office of the Department of State may have approved a Certificate of Loss of Nationality but not the denial of a *right or privilege* on the ground that he is not a national of the United States (R. 14). 8 USC Sections 901 and 903;

(e) Nowhere in the *record* is there any evidence that the supplemental portions of the Amended Complaint were allowed to be filed (R. 16-17, 29, but cf. R. 22).

QUESTIONS PRESENTED.

A. Does the Supplemental Amended Complaint state jurisdiction over the subject matter.

B. Does the Amended Complaint state jurisdiction over the subject matter.

C. Does the original Complaint state jurisdiction over the subject matter.

SUMMARY OF ARGUMENT.

1. The Amended, Supplemental, Corrected Complaint (R. 6-8, 14) does not state a claim under 8 USC Section 903. The Amended Complaint and Amended, Supplemental, Complaint do not allege a denial of a right or privilege of a national of the United States on the ground that he is not a national (R. 7, 8, 14) in that no denial is alleged. The record does not show the allowance of supplemental matter (R. 16, 17, 29, but cf. 22). But if it was allowed, a complaint showing lack of jurisdiction at the time of filing cannot be cured by supplemental matter, and allowance or disallowance of filing is therefore immaterial. A Certificate of Loss of Nationality is of itself not a denial of a right or privilege of a national until it is delivered to the applicant: 8 USC Section 901. Section 403 (a)(42) of the 1952 Act (66 Stat. 166 et seq.) repealed 8 USC Section 903; and its savings clause (Section 405) is not broad enough to allow an action under a repealed statute based on events which occurred after

the statute is repealed or to allow the filing of a suit after the repeal date.

2. The Amended Complaint (R. 6-8) does not state a claim or jurisdiction over the subject matter.

3. The original Complaint does not state a claim or jurisdiction over the subject matter.

ARGUMENT.

THE AMENDED, SUPPLEMENTAL, CORRECTED COMPLAINT DOES NOT STATE A CLAIM UNDER 8 USC SECTION 903.

In order that the argument can be consolidated the final version of the Complaint, as propounded by the Appellant, should be considered first. The essential allegations upon which considerable disagreement has manifested itself are as follows:

1. On or about October 17, 1952, Plaintiff applied at the Office of the American Vice-Consul, Kobe, Japan, for registration as a citizen of the United States (R. 7).

2. Said application for registration was denied Plaintiff by said Vice-Consul on the ground that Plaintiff had lost his United States citizenship under 8 USC Section 801(c) by reason of the aforesaid service in the Japanese Armed Forces (R. 7).

3. And instead, on November 20, 1952, said Vice-Consul executed, under his official seal as Vice-Consul of the United States, a Certificate (as to Plaintiff) of the Loss of the Nationality of the United States on the ground aforesaid (R. 7).

4. Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington Office of the Department of State on December 18, 1952 (R. 7, 9, 14).

In this area of the Amended, Supplemental, Corrected Complaint lies all of the issues involved.

Appellant alleges an application for a right or privilege of a national of the United States, the right or privilege to registration as an American citizen living abroad. He further alleges not a denial of this right or privilege but the execution on November 20, 1952, of a Certificate of Loss of Nationality (R. 7), and the approval or issuance of the same in Washington, D.C., on December 18, 1952 (R. 7, 9, 14). 8 USC Section 901.

It is plain that here Appellant has applied for a right or privilege and subsequently been denied that right or privilege on March 20, 1953 (R. 13). In the intervening process between October 17, 1952, and March 20, 1953, several administrative steps were taken:

November 20, 1952: Written opinion and preparation of a Certificate of Loss of Nationality forwarded to Washington Office of the Department of State (R. 7). 8 USC Section 901. 22 CFR 50.3.

December 18, 1952: Receipt of and presumptive telegraphic approval of the Certificate of Loss of Nationality at Washington, D.C. (R. 9, 12, 14).

March 18, 1953: Formal approval of the Certificate of Loss of Nationality by the Washington Office of the Department of State (R. 7, 9, 13).

To begin at the beginning, Appellant asserts a denial by the preparation of a Certificate of Loss of Nationality by the U. S. Consul. This is not a final decision in any sense of the word, it is at most a fact-finding report to the final arbiter in Washington, D.C. (8 USC former Section 901; Act of October 14, 1940, Chapter 876 Title I Subchapter V, Section 501, 54 Stat. 1171).

Title 22 CFR Section 50.3 reads in part as follows:

> "*Certificate of diplomatic or consular officer.* Whenever a diplomatic or consular officer of the United States has reason to *believe* that a person while in a foreign country has lost his American nationality under any provision of chapter IV of the Nationality Act of 1940 (54 Stat. 8 U.S.C. 901), he shall certify the facts upon which such *belief* is based to the Department of State in writing on the following form:" (Emphasis supplied).

As can be seen by reading both the statute (8 USC Section 901) and the regulations (22 CFR 50.3) the consul acts on belief. He does not make a decision. Only when he has reason to believe does he find facts to certify to the Department in Washington. This is a far cry from making a final decision. It seems very clear that the action of the Vice-Consul is contemplated both by the statute and by the regulations as nothing more than a fact-finding report. It is certainly not a denial of a right or privilege of a citizen of the United States.

Based upon the above facts the Amended Complaint, as distinguished from the supplemental portions, does

not disclose jurisdiction over the subject matter. There has been no denial. *Dulles v. Lung,* 9 Cir. 1954; 212 F. (2d) 73. Nor have Appellant's administrative remedies been exhausted. *Ling Share Yee, et al. v. Acheson,* 3 Cir. 1954, 214 F. (2d) 4.

To pass from an allegation impossible of performance under the laws, i.e., issuance of a Certificate of Loss of Nationality by the Consul in the first instance, to the alleged approval of the Certificate of Loss of Nationality by the Washington Office of the Department of State on December 18, 1952 (R. 14), we find this action, as it is alleged, took place on the day of receipt of the Certificate of Loss (R. 12). Not to dwell overly long on this surprising state of facts, the Department of State was evidently aroused, for one day, from its alleged delaying tactics (R. 4, 5).

Appellant alleges that here in this situation this approval of the Certificate of Loss is the effective denial of the Application of Registration (R. 7, 9, 14). (Appellant's Brief, page 12).

With this allegation we cannot agree. A Certificate of Loss standing alone is not a denial of a right or privilege of a national of the United States; it is instead, the statement of a fact that the Appellant (in this case) has, because of certain acts, lost his citizenship. We re-emphasize, this is *not* a denial, it is a basis upon which a Consular official may act — in this case, to deny the application for registration or conversely to issue a visa under Section 317(c) of the Nationality Act of 1940. (54 Stat. 1147, 8 USC former Section 717).

In *Wong Wing Foo v. McGrath,* 196 F. (2d) 120, 122, this Court held that testimony taken at a former immigration hearing was not admissible. In the course of the opinion it was stated that "This action is largely invoked where there has been no administrative proceeding at all". This statement is undoubtedly true under the proper circumstances. It may be true where (1) there is no administrative relief available, or (2) where available, the administrative authority refuses to accept and process applications therefor. These circumstances are *not* present here. Appellant applied for registration as an American citizen. This application was accepted, processed, and eventually denied (refused) on March 20, 1953.

Acheson v. Kuniyuki (9th Cir.) 189 F. (2d) 741, cited in support of this proposition, appears from this Court's opinion and the lower Court's opinion, 94 F. Supp. 358, to have no application whatsoever except that by proper application, processing, and decision, the Department of State refused registration. When the instant case was filed the State Department had reached the processing stage only.

The cases of *Wada v. Dulles,* No. 14,982 (DC SD-Calif., Jan. 13, 1955) and *Miyata v. Dulles,* No. 14,872 (DC SD-Calif., Jan. 21, 1955), obviously not available to this writer, appear, from the out of context quotations, to have ignored 8 USC Section 901 which clearly sets forth that no decision can be made by the Consul. His duty is merely to be a fact-finder. There is no final determination on a Certificate of Loss of Nationality

until approved in Washington. *In Re Katsumi Yoshida,* 113 F. Supp. 631.

This action, therefore, again falls within the purview of *Dulles v. Lung, supra,* and *Ling Share Yee, et al. v. Acheson, supra.* The very indication in the record is that the registration as a citizen was refused on March 20, 1953 (R. 13).

ALLOWANCE OF SUPPLEMENTARY MATTER.

It is noted without reference to the propriety of the allowance of the Supplemental Complaint, it is clear that standing as amended, supplemented and corrected, the Appellant's final version of the Complaint does not state a claim under 8 USC Section 903 for the reason that no denial has been made during the life of the remedy, that is, until 12 midnight, December 23, 1952. As of that date the remedy materially changed. Be that as it may, only the Court's written opinion (R. 22) indicates that the supplemental portions were allowed.

Consequently, allowance of supplementary matter in this particular case concerns events which took place prior to the effective date of the present 8 USC Section 1503, December 24, 1952. Actually, the only supplemental event is the alleged approval of the Certificate of Loss on December 18, 1952. And as has been seen before this, neither adds to nor detracts from the fact that there is no denial prior to December 24, 1952, and consequently, the remedy within the narrow confines of 8 USC Section 903 was extinguished and

the even more narrow 8 USC Section 1503 was substituted. *Ling Share Yee, et al. v. Acheson, supra; In Re Katsumi Yoshida, supra.*

A COMPLAINT DEFICIENT ON THE GROUNDS OF JURISDICTION AT THE TIME OF FILING CANNOT BE CURED BY SUPPLEMENTAL MATTER.

This Complaint cannot be supplemented to give the Court jurisdiction. As has been noted earlier in this brief, there appears to be no ground in the record for assuming that the supplemental matter was ever allowed (R. 16, 17, 29). It, however, should be called to the Court's attention that the lower Court's opinion does make reference to this matter (R. 22), however, we are quick to agree with Appellant (Appellant's Brief, page 8) that the opinion, technically speaking, is not part of the record.

We believe that had the supplemental portions of the Amended Complaint been allowed, error would have been committed. Appellant's only possibility of raising a cause of action stems from the alleged effect of the approval of the Certificate of Loss of Nationality on December 18, 1952, subsequent to the filing of this suit.

"Plaintiff cannot avoid the effect of lack of jurisdiction over the original action by alleging a new cause of action subsequently accruing because of later transactions, occurrences or events." *Bonner v. Elizabeth Arden, Inc.,* 177 F. (2d) 703, 705 (2 Cir. 1949). (See also: *Bowles v. Senderowitz,* 65 F. Supp. 548; modified

on other grounds; *Porter v. Senderowitz,* 3 Cir., 158 F. (2d) 435; *Berssenbrugge v. Luce Mfg. Co.,* 30 F. Supp. 101).

CERTIFICATES OF LOSS OF NATIONALITY EFFECT THEREOF NOTIFICATION OF APPELLANT.

Now will be considered the "doctrine of communication" which is persistently attacked throughout Appellant's Brief (Appellant's Brief, pages 8, 9, 10, 11, 13, 14, 15 and 16).

In the instant case it isn't necessary to decide whether the denial or refusal of registration as a citizen of the United States living abroad need be communicated to the Appellant, but only whether the decision in Certificate of Loss of Nationality need be communicated to the Appellant in order that action should become final as the denial of a right or privilege as a national of the United States.

In this connection, written into 8 USC Section 901 is the following:

> "If the report of the diplomatic or consular officer is approved by the Secretary of State . . . the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates."

From this it is clear that Congress contemplated that as a part of the proceeding that notice be given the person involved. A Certificate of Loss of National-

ity is a document which states a fact. The existence of Certificate of Loss of Nationality does not *ipso facto* mean a denial of a right or privilege as a national of the United States. The first opportunity that a denial could occur is when the statute has run its full course. 8 USC Section 901. This means delivery to the applicant. It is at that point, and thereafter, that a denial could appear, but not before. In this case the Consul enters the order by sending it to the person involved. This is when it becomes possible for a denial, if there be any, to become effective and not before.

How can any Complaint be filed in good faith unless, and until Plaintiff has some knowledge of the fact that a right or privilege has been denied to him?

At this point Appellee wishes to call to the attention of the Court the sequence of pleadings, as it existed both here and in *Suda v. Dulles,* No. 14,461 in this Court. In both cases, Complaints were filed in the dark, so to speak, hoping that the facts of the case would eventually come to the rescue of the pleader. In this case, the period from October 17, 1952, the date of the application of registration (R. 7), to December 16, 1952, the date of filing the original Complaint (R. 3-6), would not in any sense constitute the unreasonable delay alleged. The propriety of this type of pleading, under Rule 11 of the Federal Rules of Civil Procedure, has been commented on in *Suda v. Dulles, supra,* and should not in any sense be allowed to pass without drawing the full attention of the Court to it.

EFFECT OF THE 1952 ACT.

To begin with, Section 403(a)(42) of the Immigration and Nationality Act of 1952 repeals the Nationality Act of 1940 and all amendments thereto, which includes the remedy in 8 USC Section 903.

Secondly, Section 405(a) of the Immigration and Nationality Act of 1952 serves as a savings clause. In the instant case it is the first sentence of said section which governs, the first part of which is quoted by Appellant (Appellant's Brief, page 14) and conceded by him to be not applicable, or in the alternative, to support Appellee's contention, particularly those words italicized therein.

Appellant points to the second part of the first sentence as supporting his contention that although a faulty and deficient original Complaint was filed before the 1952 Act became effective, that a new and second Complaint based upon an express denial through the operation of the savings clause, together with supplementary matter, may be filed.

The second portion of the first sentence of Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 166 *et seq*, note to 8 USC Section 1101 provides:

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act

shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes *(sic)*, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Before we delve into the legal consequences of this statute, it will be necessary to pinpoint the rights or privileges involved. Appellant has applied to the Department of State for registration as an American citizen. This wholly administrative procedure is never disturbed by judicial proceeding until and unless for some reason the Department of State refuses said application. When this is done then, and only then, is a remedy by *judicial proceeding* available. Until 12 midnight, December 23, 1952, 8 USC Section 903 was the remedy and it was a specialized remedy. On the above date this remedy by judicial proceeding was extinguished and a new remedy substituted. Section 403(a)(42) of the Immigration and Nationality Act, 1952; 8 USC Section 1503.

Then, under these circumstances Appellant's status, condition, right in the process of acquisition, act, thing, liability, obligation or matter were contiued in force and effect. This much applies to Appellant's rights and privileges under administrative procedure. In this case the right to registration as an American citizen, and Appellant was denied this right or privilege on the ground he was not a national of the United States on March 20, 1953 (R. 13).

But Appellant further states, but not in so many words, that the statutes, or parts of statutes relating to any prosecution, suit, action, or proceedings, civil or criminal, brought or matter civil or criminal, done or existing at the time this Act shall take effect are hereby continued in force and effect under the "Savings Clause."

In the present case, as we have seen *supra,* no jurisdiction over the subject matter was acquired at any time prior to the effective date of the 1952 Act. Consequently, it was impossible at any time to invoke 8 USC Section 903 prior to its expiration. The fact that a suit was filed does not change this basic fact.

As to the statement in footnote 4 (Appellant's Brief, page 16) an examination of Section 405(a) itself precludes any such contention.

> "Nothing contained in this Act, . . . shall be construed to affect the validity of any proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action or proceeding, civil or criminal brought . . . but as to all such prosecutions, suits, actions, proceedings . . . the statutes or parts of statutes repealed by this Act are . . . continued in force and effect."

There is absolutely no mention of the ability to invoke the old remedy after the statute has been repealed.

And although we have no quarrel with the *De La Rama* case (cited in Appellant's Brief, page 15) 344 US 386, 389, there is no application here since the essentials of that savings clause are:

> "and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability."

In that case there was a primary right of action sustained *in futuro* based on the repealed statute. There is no such provision here. There is instead a new remedy substituted here. 8 USC Section 1503.

The case of *U. S. v. Menasche,* 210 F.(2d) 209 (1 Cir. 1954) is distinguished on the ground that there the naturalization proceeding, as a matter of course, culminates in Court action. Accord. *In Re Jocson,* 117 F.Supp. 528 (DC-Hawaii, 1954).

The "Savings Clause" is admittedly broad but it is not broad enough to allow an action under a repealed statute based upon events which occurred after the statute is repealed. *In Re Katsumi Yoshida* (DC-Hawaii, 1953), 113 F.Supp. 631.

THE AMENDED COMPLAINT DOES NOT STATE A JURISDICTION OVER THE SUBJECT MATTER.

As has been noted, *supra,* the Amended Complaint does not state jurisdiction over the subject matter. *Dulles v. Lung, supra.*

THE ORIGINAL COMPLAINT DOES NOT STATE JURISDICTION OVER THE SUBJECT MATTER.

The original Complaint herein (R. 3-6) proceeds on an entirely different ground than the Amended and Supplemental Complaint. Appellant alleges that quite sometime ago Appellant applied for a passport (R. 4); that this nonaction and inexcusable delay are a denial of Appellant's rights and privileges as a United States citizen. (R. 4, 5.)

Let us point out first that the "nonaction and inexcusable delay" took place between October 17, 1952 and December 16, 1952 (R. 6, 7, 12); further, that Appellant does not allege that his rights or privileges were denied on the ground that he was not a national of the United States, and as a matter of interest Appellant actually applied for registration and not a passport. (R. 7, 12.)

Appellant alleges that there was a delay. There is no allegation that the delay was caused on the ground that he was not a national of the United States. It is very possible the delay could have been caused by some other reason.

There is no allegation here that amounts to a denial of a right or privilege on the ground that Appellant is not a national. *Dulles v. Lung, supra.*

CONCLUSION.

The important issues of this case involve the effect of the Consul's action in preparing the Certificate of

Loss, the effect of the Washington office of the Department of State approving the Certificate of Loss, and the problem of whether an original Complaint or Amended Complaint which is deficient on the ground of jurisdiction over the subject matter can be cured by supplementary matter. We think the Consul's action amounts to no more than a fact-finding report. We think the Washington office's approval, admittedly a final decision, is an approval of a document stating a fact, *not* denying a right or privilege. We think that lack of jurisdiction at the time of filing a complaint cannot be cured by supplemental matter.

Dated, Honolulu, T. H.,
March 15, 1955.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.